STATE OF WISCONSIN CIRCUIT COURT BRANCH 14 DANE COUNTY

TACK OIL COMPANY,

Petitioner,

Case No. 95 CV 0962

v.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

GARROW OIL CORPORATION,

Petitioner,

v.

Case No 95 CV 1150

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

DECISION AND ORDER

BACKGROUND

Tack Oil Company and Garrow Oil Corporation (Petitioners) have petitioned the court pursuant to §227.57 Wis. Stats., to review a Wisconsin Department of Industry, Labor and Human Relations, (Respondent) decision that their requests for administrative review were untimely. Respondent denied Petitioners administrative review of a decision which denied reimbursement for certain costs to each Petitioner under the- Petroleum Environmental Cleanup Fund Act (PECFA), §101.143, Wis. Stats., stating that the requests were received more than thirty days after the date of the decision. Petitioners contend that the thirty day time limit contained in Wis. Admin. Code §ILHR 47.53(l)(b) did not begin to run due to Respondent not having complied with the requirements of §§227.47 and 227.48. After review of the applicable law, I conclude that the requirements of §227.47 and 227-48 should have been complied with, that the thirty day time limit has not yet begun to run and remand this case back to the agency for further proceedings consistent with this decision.

FACTS

There are no disputes of material fact in this case. On October 13, 1993, Petitioner Tack filed a 'Claim for Petroleum Product Investigation, Remedial Action Planning and Remedial Action Activities" (PECFA Claim") under Wis. Stats. §101.143(3). (Tack Petition for Review § 5). On or about July 11, 1994, Petitioner Tack received from Respondent a document dated June 15, 1994 entitled "Breakdown of PECFA Costs," determining that $9,396.52 of costs contained in Petitioner Tack's PECFA Claim were viewed by Respondent as not eligible for PECFA reimbursement under Wis. Stat, 10 1. 143 (4) and Wis. Admin. Code ch. ILHR 47. (Id. at ¶ 6). In that same mailing,, Petitioner received a check dated July 8, 1994 as reimbursement for costs for a portion of its PECFA Claim. (Id. at ¶ 7). On August 10, 1994, Petitioner Tack sought an administrative appeal of Respondent's decision on the eligibility of certain costs in Petitioner Tack's PECFA Claim. pursuant to Wis, Admin. Code ch. ILHR §47-53(l). (Id. at 8). On August 30, 1994, in a letter from Mr. Miles M. Mickelson of Respondent's Bureau of Petroleum Inspection and Fire Protection, DIHR denied Petitioner Tack's request for administrative appeal and hearing as untimely- (Id. at 1 9).

On or about February 15, 1993, Petitioner Garrow filed a "Claim for Petroleum Product Investigation, Remedial Action Planning and Remedial Action Activities" ("PECFA Claim") under Wis. Stats. §101.143(3). (Garrow Petition for Review 5). Respondent sent Petitioner Garrow a copy of a document dated November 20, 1993 addressed to Mike Qualio, Firstar Sheboygan, regarding PECFA reimbursement for Garrow Oil Corp, (Id. I 6). This letter determined that $33,716.40 of costs contained in Petitioner's PECFA Claim were viewed by Respondent as not eligible for PECFA reimbursement under Wis. Stat. 101.143 (4) and Wis. Admin. Code ch. ILHR 47. (Id. ¶ 6). Respondent's November 20, 1993 decision failed to provide any cost appeal information or notice of appeal deadlines. (Id. ¶ 7). On Febrary 4, 1994, Petitioncr Garrow, requested Miles M. Mickelson, PECFA Fund Coordinator, review DILHR's November 20, 1993 decision on ft eligibility of certain costs in the amount of $21,345.71, plus interest, in Petitioner Garrow's PECFA claim. (Id. 8). On February 11, 1994, in a letter from Mr. Miles M. Mickelson of DILHR's Bureau of Petroleum Inspection and Fire Protection, DILHR denied Petitioner Garrow's request for review as untimely. (Id. ¶ 9). On March 11, 1994, Petitioner Garrow sought administrative appeal of Respondent's decision on the eligibility of certain costs in the amount of $21,345.71, plus interest, in Petitioner Garrow's PECFA Claim, pursuant to Wis. Admin. Code §ILHR 47-53(l). (Id. 10). On January 30, 1995, Respondent issued a final decision dismissing Petitioner Garrow's request for a hearing on the grounds that the request was untimely. (Id. ¶ 11).

STANDARD OF REVIEW

There are three levels of deference that a court may give an administrative agency's statutory interpretations: 1) "great weight" if the agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute; 2) "due weight" standard where the agency's decision is very nearly one of first impression; and 3) "no weight" standard where the issue is Clearly one of first impression and where the agency has no special experience in determining the issue. Kelley Co., Inc, v. Marquardt, 172 Wis. 2d 234, 244, 493 N.W. 2d 68 (1992). However, an agency interpretation of an unambiguous statute is entitled to no deference. City of

Milwaukee v. Lindner, 98 Wis.2d 624, 634, 297 N.W.2d 828 (1980). Further, an administrative agency's decision that deals with the scope of its own power is not binding. Loomis v. Wisconsin Personnel Commission, 179 Wis. 2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993).

DECISION

The issue before the court is whether respondent's interpretation of the types of decisions that fall within the notice requirements of §227.47 and 227.48 is correct. This is a question of law regarding an unambiguous statute, Therefore, the court will give Respondent's interpretation no deference.

Respondent's determination to deny both Petitioners' requests for administrative review was based on a determination that the requests were not filed within thirty days of the respective award letters issuing. Petitioners allege that the thirty day time period for filing never began to run because the award letters did not include notice of any right to petition for administrative review.

The relevant portion of § 227.47, Stats., states:

> (1)Except as provided in sub. (2), every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon which each material issue of fact without recital of evidence. Every proposed or final decision shall include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53. The agency shall by rule establish a procedure for determination of parties.

Section 227.48, Stats. states:

> (1) Every decision when made, signed and filed, shall be served forthwith by personal delivery or mailing of a copy to each party to the proceedings or to the party's attorney of record.
>
> (2) Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to he named as respondent. No time period specified under s. 227,49(1) for filing a petition for rehearing, under §227.53(l)(a) for filing a petition for judicial review or any other section permitting administrative review of an agency decision begins to run until the agency has complied with this subsection.

Respondent claims that the PECFA award letters are not “final decisions” as contemplated by §227.47 and 227.48 and therefore do not need to include notice of any right to petition for rehearing.[1] Respondent contends that the types of decision that are included are 1) proposed or final decisions of an agency or hearing examiner following a hearing and 2) every final decision of an agency. (Respondent's Brief at 8). Although the court agrees with Respondent's analysis of the types of decisions that are 'within the scope of the chapter, the court does not agree that award letters are not "final decisions" of the agency.

In these cases the award letter and accompanying check constituted a final decision from Respondent regarding how much money the parties were going to be reimbursed. Although Petitioner Garrow's award letter stated “Please let me know if you have any additional questions pertaining to this reimbursement,” this can hardly be construed to indicate that there was going to be further steps before the process was over. Petitioner Tack's award letter contained nothing that could be construed as indicating an ongoing process: "The dollar amount authorized for reimbursement conforms to the policies and guidelines established for the fund by the Petroleum Environmental Cleanup Council.” The court is satisfied that the award letters constitute a final decision by Respondent, and therefore needed to include the statutory notice provisions in order for the time limits in §ILHR 47.53 to begin to run.

COSTS

Petitioners have requested reimbursement of costs and attorney's fee pursuant to §227.485, Stats. Under 227.495(6), Stats, the court shall make the applicable findings under §814.245, Stats., and award costs if appropriate.

The court finds that the agency position was not substantially justified in its position for the reasons set forth above. The court therefore awards costs and awaits Petitioners' application pursuant to §814.245 (6), Stats.

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[1]Respondent suggests that Petitioners' argument to the contrary, "taken to its logical conclusion would allow any party to create a “final decision” by failing to exhaust the internal administrative remedies provided by statute.” (Respondent's Brief at 10). Respondent goes on to urge that under Petitioners' construction, "petitioners would be allowed to file a judicial review proceeding of PECFA award letters because they are “final” and. at the same time, pursue an internal administrative remedy which is designed to resolve problems before judicial review becomes necessary.' (Id. at 12). The issue in this case is whether notice of the availability of administrative review pursuant to ILHR 47.53 and the time limits therein need to be included in the PECFA award letters. It is not an attempt to secure judicial review before all administrative remedies have been exhausted as suggested by Respondent's comments.

CONCLUSION

The PECFA award letters sent to Petitioners are decisions within the meaning of §§227.47 and 227.48 and therefore must include the notice provisions. Because Respondent did not include the Statutory required notice in the award letters, the time period specified under § ILHR 47.53 permitting administrative review has not yet begun. This case is REMANDED to the agency with instructions to grant each Petitioner administrative review of their respective PECFA award letters.

IT IS SO ORDERED.

Dated this 21 day of April, 1996.

By the Court

Case Nos. 95 CV 962, 95 CV 1150
George A. W. Northup, Judge
Circuit Court Branch 14

cc: Attorney Thomas 1. Basting
Attorney Linda H. Bochen
AAG Monica Burkert-Brist